AGT Energy Technologies Sdn Bhd v Mok Chik Pow & Anor

HIGH COURT (SHAH ALAM) — WRIT NO BA-22NCVC-599–10 OF 2016
AKHTAR TAHIR J
24 JULY 2017

Contract — Sale and purchase of shares — Option — Plaintiff and defendants entered into share sale agreement — Defendants sold their shares in their company to plaintiff — Defendants were given two options as consideration of agreement — First option did not materialise — Defendants rejected second option — Plaintiff and defendants entered into service agreements — Defendants appointed as chief operation officer and general manager of plaintiff — Whether defendants had no choice but to exercise second option — Whether second option still available — Whether share sale agreement ploy to steal design developed by first defendant — Whether defendants overpaid after expiry of their tenure — Whether defendants used money sent by plaintiff for personal purpose

AGT Energy Technologies Sdn Bhd ('the plaintiff') and the defendants entered into a share sale agreement ('the agreement') whereby the defendants agreed to sell their entire shares in a company known as Violed International Pte Ltd ('Violed') to the plaintiff for a consideration which was stated in cl 2.2 of the agreement. There were two options available under the said clause, firstly, the shares in New Listco ('the first option') and secondly, if New Listco was not listed in the stock exchange, the defendants shall have option to be issued with the shares in Allgreentech International Plc ('AIP') ('the second option'). Pursuant to the agreement, two separate service agreements were entered between the plaintiff and the defendants in which the defendants were employed as chief operating officer ('COO') and general manager ('GM') of the plaintiff for a period of three years. The first option could not be complied with as there was a failure to list the company in the stock exchange within the period of two years as was agreed. Consequently, the plaintiff offered the second option to the defendants. However, the second option was refused by the defendants as the AIP shares were no longer listed in Frankfurt Stock Exchange. In the alternative, the defendants demanded a cash consideration of a sum of SGD1m. In the present case, the issues for determination were whether the defendants had no choice but to exercise the second option on the failure of the first and whether the second option was still available. On top of that, there was an allegation by the defendants that the agreement was merely a ploy of the directors of the plaintiff to steal the designs of the product of Violed developed by the first defendant ('the defendant's allegation'). On the other hand, the plaintiff submitted that the defendants had been overpaid for three months after the expiry of their tenure under the service agreement. The

plaintiff further submitted that the defendants had used the money sent by the plaintiff for their personal purpose. A

Held:

(1) Clause 2.2 of the agreement provided that only two options were available to the defendants. Even clearer was the fact that there was nowhere stated that a third option available to the defendants that the defendants could opt to receive a cash consideration of SGD1m. What the agreement stated in cl 2.1 was that the value of the shares transferred was SGD1m but this sum could only be satisfied by one of the two options available in cl 2.2 of the agreement (see para 25). B C

(2) It was clear from the interpretation clause of the agreement that the AIP shares were defined as the 'AIP shares listed at the Frankfurt Stock Exchange'. As the AIP shares were no longer so listed and this was not due to the fault of either party, this second option became impossible to perform. Section 57(2) of the Contracts Act 1950 ('the Act') states that an agreement that becomes impossible to perform becomes void (see paras 26–27). D

(3) The defendant's allegation could not be true as the first defendant himself had voluntarily by signing to accept the post of COO had agreed to transfer the rights of any design created by him to AGT (see para 28). E

(4) It must be noted that on the expiry of their tenure, both the defendants had been appointed as directors of the company. The salary slip reflected this change of status by stating that the payment was a director's fee. The court had to give the meaning as stated in the language where the language was clear and unambiguous no matter what the real intentions of the parties were (see para 29). F

(5) There was no evidence adduced by the plaintiff to show that the defendants had used the money sent by the plaintiff for their personal purpose. The court was also satisfied that the company belonging to the defendants was not operated as a rival but was only retained to facilitate payment of utility bills. In conclusion, based on the provisions of the Act, the court directed that whatever benefits the plaintiff received under the agreement be returned to the defendants. Since the plaintiff had receive the shares of Violed belonging to the defendants, these shares were therefore directed to be returned to the defendants. The defendants' claim against the plaintiff was also dismissed by the court (see paras 30–31). G H I

[Bahasa Malaysia summary

AGT Energy Technologies Sdn Bhd ('plaintif') dan defendan menandatangani perjanjian penjualan saham ('perjanjian') di mana defendan bersetuju untuk

menjual keseluruhan saham mereka dalam syarikat yang dikenali sebagai Violed International Pte Ltd ('Violed') kepada plaintif untuk balasan yang dinyatakan dalam klausa 2.2 perjanjian itu. Terdapat dua opsyen yang terdapat di bawah klausa tersebut, yang pertama, saham di New Listco ('opsyen pertama') dan kedua, jika New Listco tidak tersenarai di bursa saham, defendan akan mempunyai opsyen untuk diberi saham dalam Allgreentech International Plc ('AIP') ('opsyen kedua'). Menurut perjanjian itu, dua perjanjian perkhidmatan yang berasingan dimasuki antara plaintif dan defendan di mana defendan bekerja sebagai ketua pegawai operasi ('COO') dan pengurus besar ('GM') plaintif untuk tempoh tiga tahun. Opsyen pertama tidak dapat dipatuhi kerana terdapat kegagalan menyenaraikan syarikat itu dalam bursa saham dalam tempoh dua tahun seperti yang disetujui. Oleh itu, plaintif menawarkan opsyen kedua kepada defendan. Walau bagaimanapun, opsyen kedua ditolak oleh defendan kerana saham AIP tidak lagi disenaraikan di Bursa Saham Frankfurt. Secara alternatif, defendan menuntut balasan tunai berjumlah SGD1 juta. Dalam kes ini, isu-isu bagi penentuan adalah sama ada defendan tidak mempunyai opsyen tetapi untuk melaksanakan opsyen kedua bagi kegagalan pertama dan sama ada opsyen kedua masih ada. Di samping itu, terdapat pertuduhan oleh defendan bahawa perjanjian itu satu helah oleh pengarah plaintif untuk mencuri reka bentuk produk yang dilancarkan oleh defendan pertama ('tuduhan defendan'). Sebaliknya, plaintif mengemukakan bahawa defendan telah terlebih bayar selama tiga bulan selepas tamat tempohnya di bawah perjanjian perkhidmatan. Plaintif seterusnya mengemukakan bahawa defendan telah menggunakan wang yang dihantar oleh plaintif untuk tujuan peribadi mereka.

Diputuskan:

(1) Klausa 2.2 perjanjian memperuntukkan bahawa terdapat dua opsyen untuk defendan. Lebih jelas lagi adalah hakikat bahawa tidak dinyatakan sama sekali bahawa opsyen ketiga tersedia buat defendan bahawa defendan boleh memilih untuk menerima balasan tunai SGD1 juta. Apa yang dinyatakan oleh perjanjian dalam klausa 2.1 adalah bahawa nilai saham yang dipindahkan adalah SGD1 juta tetapi jumlah ini hanya dapat dipenuhi oleh salah satu opsyen dalam klausa 2.2 perjanjian (lihat perenggan 25).

(2) Jelas berdasarkan klausa tafsiran perjanjian bahawa saham AIP ditakrifkan sebagai 'saham AIP yang disenaraikan di Bursa Saham Frankfurt'. Oleh kerana saham AIP tidak lagi disenaraikan dan ini bukan disebabkan oleh salah satu pihak, opsyen kedua ini menjadi mustahil untuk dilakukan. Seksyen 57(2) Akta Kontrak 1950 ('Akta') menyatakan bahawa perjanjian yang menjadi mustahil untuk dilaksanakan menjadi tidak sah (lihat perenggan 26–27).

(3) Pertuduhan defendan tidak mungkin benar kerana defendan pertama

sendiri secara sukarela menandatangani untuk menerima jawatan COO dan bersetuju untuk memindahkan hak-hak mana-mana reka bentuk yang dibuat olehnya kepada AGT (lihat perenggan 28).

(4) Harus diingat bahawa apabila tamat tempohnya, kedua-dua defendan telah dilantik sebagai pengarah syarikat. Slip gaji mencerminkan perubahan status dengan menyatakan bahawa bayaran itu adalah yuran pengarah. Mahkamah perlu memberi makna seperti yang dinyatakan dalam bahasa di mana bahasa itu jelas dan tidak jelas tanpa mengira maksud sebenar pihak-pihak itu (lihat perenggan 29).

(5) Tidak ada keterangan yang dikemukakan oleh plaintif untuk menunjukkan bahawa defendan telah menggunakan wang yang dihantar oleh plaintif untuk tujuan peribadi mereka. Mahkamah juga berpuas hati bahawa syarikat milik defendan tidak dikendalikan sebagai saingan tetapi hanya dikekalkan untuk memudahkan pembayaran bil-bil utiliti. Kesimpulannya, berdasarkan peruntukan-peruntukan Akta, mahkamah mengarahkan bahawa apa sahaja faedah yang diterima oleh plaintif di bawah perjanjian itu dikembalikan kepada defendan. Oleh kerana plaintif telah menerima saham defendan, maka saham tersebut diarahkan untuk dikembalikan kepada defendan. Tuntutan defendan terhadap plaintif juga ditolak oleh mahkamah (lihat perenggan 30–31).]

Notes

For cases on option, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6854–6859.

Cases referred to

Bank of Credit and Commerce International SA v Ali and others [2002] 1 AC 251, HL (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd [2006] 6 MLJ 544; [2007] 2 CLJ 127, CA (refd)

Legislation referred to

Contracts Act 1950 ss 57(2), 66

Ramesh a/l Kanapathy (Lynn Anne Johnson with him) (Chellam Wong) for the plaintiff.

David Chang Koh Wei (Heng Shu Lin with him) (Mustafa, Ling & Co) for the defendants.

Akhtar Tahir J:

BACKGROUND FACTS

[1] For ease of reference the two parties in the claim and counterclaim in this case will be referred to as AGT and Mok and Cho.

[2] At the material time, Mok and Cho were the legal owners of 430,000 shares representing the entire paid up capital of a company called Violed International Pte Ltd ('Violed') a company registered and operating in Singapore.

[3] AGT and Mok and Cho entered a share sale agreement (exh P4, 'the agreement') whereby Mok and Cho agreed to sell their entire shares in the company for a consideration which was spelled out in cl 2.2 of the agreement.

[4] For purposes of clarity the entire cl 2.2 is set out in full here as a large part of the decision in this case depends in the interpretation of this clause:

> 2.2 The Consideration Shares must be issued and allotted to Ms Cho Eng-Me no later than two (2) years after Completion. The Consideration Shares must be allotted as fully paid ordinary shares in the capital of NEW LISTCO free from all liabilities or charges or liens or any other encumbrances (other than the Moratorium and Call Option as defined in this Agreement.) If NEW LISCO is not listed on the Malaysian or Singaporean stock exchange within two (2) years from Completion, then the Vendors shall have the option for Ms Cho Eng-me to be issued and allotted shares in AIP in substitution of shares in NEW LISTCO ('AIP Shares'), subject to the following:
>
> (i) The amount of AIP Shares shall be at the current par value of AIP Shares as at the date that the new AIP Shares are to be issued, calculated at the rate set out in Schedule 3 hereto.
>
> (ii) If the Vendors exercise this right, all references to the Consideration Shares in this agreement shall mean the AIP Shares in substitution of shares in NEW LISTCO, as the context so requires.

[5] Further in pursuance of the agreement, two separate service agreements (exhs P5 and P6) were entered between AGT and Mok and Cho to employ both Mok and Cho as chief operating officer ('COO') and general manager ('GM') respectively of AGT with a salary and a tenure of service as specified in cl 2.1(b) of the service agreement.

[6] As the tenure of service of Mok and Cho is another bone of contention in this case this clause is set in full and is worded as follows:

(b) The appointment shall commence on the Commencement Date and shall continue for a period of three (3) years and shall, thereafter, be automatically terminated. At the absolute discretion of the Company, the appointment may be extended for another such period of two (2) years unless otherwise terminated in accordance with the provisions of this Agreement.

[7] As time progressed it was clear that the first option as stated in cl 2.2 of the agreement could not be complied with as there was a failure to list any company with the stock exchange within the period of two years as was agreed. Mok and Cho blamed this failure on AGT and more specifically on their directors who were named in the counterclaim. It was the contention of Mok and Cho that the directors of AGT had not acted conscionably in turning around Violed for it to be listed.

Mok and Cho went on to say that the agreement was merely a ploy of the directors of AGT to steal the designs of the product of Violed developed by Mok. Mok and Cho further reiterated that their role was only to research and design LED lights and it was never their role to sell or market the products. Mok and Cho further alleged that their endevour was not supported by the directors of AGT either in form of manpower or financial support.

[8] AGT on the other hand alleged that the failure of turning around Violed was the fault of Mok and Cho in unsuccessfully developing and marketing the products designed by them more specifically LED lights. The directors of AGT further alleged that the failure to turn around Violed was partly due to the reluctance of Mok and Cho to relocate from Singapore to Malaysia for purposes of setting up plant in Malaysia. The directors finally contended that the money remitted by AGT for purposes of Violed was wrongly used for personal purposes of Mok and Cho as well as benefitting a rival company belonging to Mok and Cho concealed from AGT.

[9] As the first option had failed to materialise, AGT offered the second option of the AIP shares to Mok and Cho. This was flatly refused by Mok and Cho for the reasons that they had a choice of not accepting the second option. Mok and Cho in the alternative demanded a cash consideration of a sum of SGD1m. Another reason given Mok and Cho in refusing the second option was the AIP shares were no longer listed in Frankfurt stock exchange and this fact had been concealed from them by AGT. As Mok and Cho had refused the second option it was AGT's contention that Mok and Cho had repudiated the agreement and therefore had no further claim against AGT under the agreement.

[10] A final dispute between the parties related to the service agreement. AGT contended that the tenure of the employment was for three years and after three years the employment automatically lapsed unless extended. In this

A case there was no such extension but Mok and Cho had remained in their post for another three months and had been paid a salary. AGT now claims back this salary of three months.

ISSUES TO BE TRIED

B

[11] The trial proceeded on the issues to be tried as agreed between the parties and the issues are as follows.

Issue 1

C

[12] Whether Mok and Cho had the option to not accept the shares in Allgreentech International Plc ('the AIP shares') as consideration pursuant to exh P4 — share sale agreement dated 2 February 2012.

Issue 2

D

[13] Whether AGT, Manjit, Gurmit, Navin and Acepoint had acted unconscionably in not taking the necessary steps to list the NEW LISTCO in Bursa Malaysia and/or Singapore.

E *Issue 3*

[14] Whether AGT, Manjit, Gurmit, Navin and Acepoint had acted unconscionably in not taking the necessary the fact that AIP had already been delisted in the stock exchange.

F

[15] Whether as a result, AGT's veil of incorporation ought to be lifted to make Manjit, Gurmit and Navin either jointly or severally liable for the loss and damage for the breach of exh P4 — share sale agreement dated 2 February 2012.

G

Issue 4

[16] Whether Mok and Cho's service agreements dated 2 February 2012 (exhs P5 and P6) were extended upon the expiration of three years.

H

[17] As a result, whether Mok and Cho were entitles to receive salaries for the subsequent three months upon the expiration of the said exhs P5 and P6 — service agreements.

I **[18]** Whether exhs P5 and P6 — service agreement were wrongfully terminated by AGT.

Issue 5

[19] Whether Mok and Cho while serving as the COO and GM respectively of AGT breached their fiduciary duty by carrying on a competing business via a company called LMW Electronics LTD ('LMW').

Issue 6

[20] Whether the loans given by AGT to Violed in the sum of RM1.5m was used by Mok and Cho for their personal purposes.

FINDINGS OF THE COURT

[21] It is an undisputed fact in this case that the first option available to Mok and Cho as consideration was untenable simply because the parties were unable to meet the conditions necessary to list a company at the Stock Exchange. By way of evidence there were allegations and counter allegations as to why these conditions could not be achieved especially in terms of generating sufficient income or revenue to enable the listing.

[22] Sieving through the evidence the court found the evidence insufficient to prove the allegation of either side. In court's view AGT had taken necessary steps in administering and financing the company as per the request and requirement of Mok and Cho. On their part Mok and Cho had made all efforts to rejuvenate the company and even had relocated to Malaysia to try to turn the fortunes.

[23] It was just unfortunate that the existing company or a new company could not be listed. This was in fact foreseen by the parties in the agreement itself when a second option was stipulated in the agreement as a consideration.

[24] To determine whether Mok and Cho had no choice but to exercise the second option on the failure of the first and whether the second option was still available, it is necessary to look and interpret the agreement in the proper context.

In *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 per Gopal Sri Ram FCJ (as he then was) held as follows:

> When interpreting a private contract the court must not confine itself to the four corners of the document but also look at the factual matrix forming the background of the transaction, all material that was reasonably available to the parties, disregard any subjective intent and adopt an objective approach.

[25] In interpreting the agreement in the proper context it is clear that the

party envisaged that there were only two options available to Mok and Cho. The words in the clause 'shall have the option' does not necessarily mean Mok and Cho has a choice whether to exercise this second option or not.

Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544; [2007] 2 CLJ 127 at para 23(4) at p 556 (MLJ); at p 142 (CLJ) in summarising the developments in the law relating to interpretation of contracts said:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352; [1997] 2 WLR 945).

Looking at the context of the clause it means only two options are available to Mok and Cho. Even clearer is the fact that there is nowhere stated that a third option available to Mok and Cho can opt to receive a cash consideration of SGD1m. What the agreement states in cl 2.1 is that the value of the shares transferred is SGD1m but this sum can only be satisfied by one of the two options available in cl 2.2 of the agreement. If the parties intended that the sale of the shares is to be satisfied by cash payment there was no necessity at all to insert the two options in the agreement.

[26] Moving on, the next issue that arises in this case is whether the second option is still available. It is best to interpret the second clause in the light of what was stated by Lord Clyde in *Bank of Credit and Commerce International SA v Ali and others* [2002] 1 AC 251 as follows:

> The knowledge reasonably available to them (the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they never in fact had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement.

It is clear from the interpretation clause of the agreement the AIP shares are defined as the 'AIP shares listed at the Frankfurt Stock Exchange'. As the AIP shares are no longer so listed and this not due to the fault of either party this second option becomes impossible to perform.

Notices of the delisting would be in the public domain therefore there is no necessity to notify specifically Mok and Cho about the delisting. The AGT on the other hand cannot insist on delivering the AIP shares regardless whether the shares are listed or not. The very nature of the shares has now changed although they might have retained their value. The fact remain that what was agreed between the parties were the shares as listed in the stock exchange.

[27] To determine the effect of impossibility of an event on an agreement the court has to fall back to Contracts Act 1950 which states in s 57(2) that an agreement that becomes impossible to perform becomes void

> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The remedy available in the situation above is as stated in s 66 of the Contracts Act 1950 as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[28] A further issue that needed a determination in this case is the serious allegation by Mok and Cho that AGT entered into this agreement as a ruse steal the designs created by Mok. This certainly could not be true as Mok himself had voluntarily by signing to accept the post of COO had agreed to transfer the rights of any design created by him to AGT. This is stated the service agreement.

[29] On AGT's contention that Mok and Cho had been overpaid for three months after the expiry of their tenure under the service agreement it is to be noted that on the expiry of their tenure both Mok and Cho had been appointed as directors of the company. The salary slip reflects this change of status by stating that the payment is as director's fee. The court has to give the meaning as stated in the language where the language is clear and unambiguous no matter what the real intentions of the parties are.

[30] Finally in this case there is no evidence adduced by AGT to show that Mok and Cho had used the money sent by AGT for their personal purpose as alleged by AGT. The court is also satisfied that the company belonging to Mok and Cho was not operated as arrival but was only retained to facilitate payment of utility bills.

A CONCLUSION

[31] Taking the cue from the provisions of the Contracts Act 1950 the court in deciding this case directed that whatever benefits AGT received under the agreement be returned to Mok and Cho. In this case since AGT had received the shares of Violed belonging to Mok and Cho these shares were therefore directed to be returned back to Mok and Cho. Meanwhile Mok and Cho's claim against AGT was dismissed. Both parties were ordered to bear their own cost.

C *Order accordingly.*

Reported by Dzulqarnain Ab Fatar